

# **CERTIFICATE.**

---

**SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 1911.**

---

**No. 641.**

**M. ANDERSON**

**vs.**

**THE PACIFIC COAST STEAMSHIP COMPANY, CLAIMANT  
OF THE STEAMSHIP "QUEEN," &c.**

---

**No. 642.**

**N. JORDAN**

**vs.**

**THE PACIFIC COAST COMPANY, CLAIMANT OF THE  
STEAMSHIP "UMATILLA," &c.**

---

**ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE NINTH CIRCUIT.**

---

**FILED JUNE 6, 1911.**

**(22,717 and 22,718)**



(22,717 and 22,718)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

---

No. 641.

M. ANDERSON

vs.

THE PACIFIC COAST STEAMSHIP COMPANY, CLAIMANT  
OF THE STEAMSHIP "QUEEN," &c.

---

No. 642.

N. JORDAN

vs.

THE PACIFIC COAST COMPANY, CLAIMANT OF THE  
STEAMSHIP "UMATILLA," &c.

---

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE NINTH CIRCUIT.

---

INDEX.

	Original	Print
Caption .....	1	1
Certificate of the United States circuit court of appeals for the ninth circuit.....	1	1
Statement .....	1	3
Questions certified .....	5	4
Clerk's certificate .....	7	6

1 In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 1850.

M. ANDERSON, Appellant,

vs.

THE PACIFIC COAST STEAMSHIP COMPANY, a Corporation, Claimant of the Steamship "Queen," Her Engines, Boilers, Machinery, Tackle, Apparel, and Furniture, Appellee.

No. 1851.

N. JORDAN, Appellant.

vs.

THE PACIFIC COAST COMPANY, a Corporation, Claimant of the Steamship "Umatilla," Her Engines, Boilers, Machinery, Tackle, Apparel, and Furniture, Appellee.

Upon Appeal from the United States District Court for the Northern District of California.

Causes Consolidated on the Appeal.

Before Gilbert and Morrow, Circuit Judges, and Wolverton, District Judge.

Certificate of the United States Circuit Court of Appeals for the Ninth Circuit, to the Supreme Court of the United States, under Section 6 of the Act of March 3, 1891, entitled "An act to establish circuit courts of appeal and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes."

2 The libels in the above cases involve the question of the power of a state to make pilotage regulations for certain classes of registered sea going steam vessels when entering and leaving harbors within the confines of the State.

The steamers "Queen" and "Umatilla" were regularly sailing under register and were either on a voyage from the port of San Francisco in the State of California to a United States port on Puget Sound or from a United States port on Puget Sound to said port of San Francisco, but in either such case said vessels did while enroute between said ports of the United States stop at the port of Victoria, B. C., to and from which port of Victoria they did then carry and did then and there deliver and receive both passengers, mail and freight. Both vessels sailed direct to Victoria from San Francisco and direct to San Francisco from Victoria. At least ninety (90) per cent of passengers and cargo was carried be-

tween the United States ports and the parties stipulated that the voyage for which the vessels cleared was between Puget Sound ports of the United States and San Francisco, with the right to stop and trade enroute at Victoria. The stop at Victoria on each occasion was for about an hour. The officers of each vessel had federal pilot's licenses and each vessel was in fact piloted in entering and leaving the port of San Francisco by such an officer. Each of the vessels was tendered pilotage services—the "Umatilla" on leaving port and the "Queen" on entering—by a resident bar pilot of the port of San Francisco, duly commissioned, and acting under the law of the State of California. In each case the tender was declined. The ships refused to pay the pilotage fees imposed by the following sections of the Political Code of the State of California:

"2468. Pilotage and half pilotage. All vessels sailing under an enrollment, and licensed and engaged in the coasting trade between the port of San Francisco and any other port of the United States shall be exempt from all pilotage unless a pilot be actually employed. All foreign vessels and all vessels from a foreign port or bound thereto, and all vessels sailing under a register between the port of San Francisco and any other port of the United States shall be liable for pilotage as provided in section twenty-four hundred and sixty-six (2466) of this code."

"2466. Rates of pilotage at San Francisco. The following shall be the rates of pilotage into and out of the harbor of San Francisco: All vessels under five hundred (500) tons three (\$3.00) dollars per foot draught; all vessels over five hundred (500) tons three (\$3.00) dollars per foot draught and three (3c.) cents per ton for each and every ton registered measurement; and every vessel spoken inward or outward bound except as hereinafter provided shall pay the said rates. A vessel is spoken by day by a pilot boat displaying a union jack or by night displaying a torch or flare up within a distance of three (3) miles of the vessel. In all cases where inward bound vessels are not spoken until inside of the bar the rates of pilotage herein provided shall be reduced fifty (50) per cent. Vessels engaged in the whaling or fishing trade shall be exempt from all pilotage except where a pilot is actually employed."

"2432. Vessel, owner, etc., liable for pilotage. All vessels, their tackle, apparel and furniture, and the master and owners thereof, are jointly and severally liable for pilotage fees, to be recovered in any court of competent jurisdiction."

On February 28, 1871, Congress enacted an act "for the better protection of persons on vessels propelled in whole or in part by steam, etc.", section 51 of which is pertinent to these cases. This section was in 1873 reenacted in sections 4401 and 4444 of the revised statutes. The portions of the section and its subsequent codification on which the court's questions are based are printed in parallel columns as follows:

"An Act to Provide for the Better Security of Life on Board of Vessels Propelled in Whole or in Part by Steam."

Revised Statutes Title LII.  
"Regulation of Steam Vessels."

"SECTION 51. And be it further enacted that \* \* \* every coastwise sea-going steam vessel subject to the navigation laws of the United States, and to the rules and regulations aforesaid, not sailing under register, shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats. \* \* \* Nor shall any pilot charges be levied by any such (State) authority upon any steamer piloted as herein provided \* \* \* Provided, however, that nothing in this act shall be construed to annul or affect any regulation established by the laws of any State requiring vessels entering or leaving a port in any such State, other than coastwise steam vessels, to take a pilot duly licensed, or authorized by the laws of such State, or of a State situate upon the waters of such State."

(The above in a single paragraph.)

R. S. 4401. "\* \* \* and every coastwise sea going steam vessel subject to the navigation laws of the United States, and to the rules and regulations aforesaid, not sailing under register, shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats."

R. S. 4444. "\* \* \* nor shall any pilot charges be levied by any such (State) authority upon any steamer piloted as provided by this title \* \* \* Nothing in this title shall be construed to annul or affect any regulation established by the laws of any State requiring vessels entering or leaving port in any such State, other than coastwise steam vessels, to take a pilot duly licensed or authorized by the laws of such State, or of a State situate upon the waters of such State."

4 The pilots, appellants here, libelled the vessels in the United States District Court for the Northern District of California. The two cases were consolidated for trial in the District Court. It was contended that there was a conflict between the Federal and the State law as to the control of the vessels for purposes of bar pilotage. The libelants relied upon the State law giving the resident state bar pilotage control of the vessels in question when entering or leaving port. The District Court held that the Federal law excluded these vessels from State control and the libels were dismissed.

On appeal to this court it has become apparent that the decision of the two cases involves a question of conflict of jurisdiction between the State and the Federal government as to the pilotage of all steam vessels touching at both foreign and domestic ports on the one voyage and also as to the pilotage of the large number of registered steam vessels now engaged in traffic between ports of the Atlantic

and the Pacific coasts of the United States, both by way of the Isthmus of Tehuantepec and the Isthmus of Panama and around South America. The decision will also affect the very large number of steam vessels which may reasonably be expected to sail between American ports on the Atlantic and the Pacific Oceans, via the Panama Canal.

In determining the intent of Congress in passing the Act of February 28, 1871, the court had under consideration the following statutes: the Act of August 7, 1789, codified in section 4235 of the Revised Statutes, recognizing and adopting the pilotage regulations of the various states so far as bar and entrance pilotage is concerned: section nine, paragraph nine and ten of the Steamship Act of August 30, 1852, creating a certain class of Federal pilots, (10 Statutes at Large, 67, reenacted in chapter 100, sections 18 and 14 of Act of February 28, 1871, (codified in Revised Statutes 4442 and 4438): Act of May 27, 1848, (codified in Revised Statutes 3126), permitting registered vessels sailing between ports of the United States to trade with foreign ports; section twenty of the Act of February 18, 1793, (1 Stats. 313, codified in Revised Statutes 4361), providing for the regulation and duties of officers on registered vessels as to the carriage of foreign goods and distilled liquors and the making of manifests.

The members of the court are unable to agree as to the interpretation of the cited portions of section 51 of the Act of February 28, 1871, codified in Revised Statutes, sections 4401 and 4444, and for this reason, and because of the importance of the interests affected both governmental and commercial, the Circuit Court of Appeals for the Ninth Circuit certify the following questions to the United States Supreme Court, and request its instructions upon them.

1. Are coastwise sea going steam vessels, sailing under register and having officers with federal pilot's licenses, free from any liability for pilotage fees created by sections 2468, 2466 and 2432 of the Political Code of the State of California, upon the proper tender of services of resident bar pilots of the State pilotage establishment, when entering or leaving the port of San Francisco, by virtue of section 51 of the Act of February 28, 1871, entitled "An Act to provide for the Better Security of Life on Board of Vessels Propelled in Whole or in Part by Steam," as reenacted of date December 1, 1873, in sections 4401 and 4444 of the Revised Statutes?

2. Are there any provisions of title 52 of the Revised Statutes which may be construed as exempting coastwise sea going steam vessels sailing under register, whose officers have federal pilot's licenses from any liability for pilotage fees created by sections 2468, 2466 and 2432 of the Political Code of the State of California, upon the proper tender of services of resident bar pilots of the State pilotage establishment, when entering or leaving the port of San Francisco, State of California, under the rule of construction laid down in the last sentence of section 51 of the Act of February 28, 1871,

6 entitled "An Act to Provide for the Better Security of Life on Board of Vessels Propelled in Whole or in Part by Steam," and as reenacted in section 4444 of the Revised Statutes?

3. Did Congress intend to classify with the "coastwise vessels" referred to in the last proviso of section 51 of the Act of February 28, 1871, entitled "An Act for the Better Security of Life on Vessels Propelled in Whole or in Part by Steam," and reenacted in section 4444 of the Revised Statutes, registered steam vessels engaged in commerce with both foreign and domestic ports on the same voyage?

4. Did Congress, in enacting the last proviso of section 51 of the Act of February 28, 1871, reenacted in section 4444 of the Revised Statutes, intend to exempt registered steam vessels whose officers have federal pilot's licenses, from any liability for pilotage fees created by sections 2468, 2466 and 2432 of the Political Code of the State of California, upon proper tender of services of resident bar pilots of the State pilotage establishment, on entering or leaving the port of San Francisco on regular voyages, on which they steamed to Victoria, British Columbia, and carried cargo, mail and passengers direct thereto and direct therefrom; when, after leaving Victoria, British Columbia, on the outward voyage, they steamed to Puget Sound ports of the State of Washington, for which they had originally cleared, and returned therefrom to Victoria, British Columbia, when the stop at Victoria, British Columbia, is for about an hour on each occasion; when at least ninety (90) per cent of the passenger and cargo traffic for the outward and inward voyages is between the port of San Francisco and the ports of Washington; and when the traffic with the foreign port may be deemed en route between the domestic ports?

Dated this 15th day of May, 1911.

(Signed)

WM. B. GILBERT,

*Circuit Judge.*

(Signed)

WM. W. MORROW,

*Circuit Judge.*

(Signed)

CHAS. E. WOLVERTON,

*District Judge.*

(Endorsed:) Certificate of United States Circuit Court of Appeals for the Ninth Circuit under Section 6 of the Act of March 3, 1891. Certifying Certain Questions to the Supreme Court of the United States. Filed May 15, 1911. F. D. Monekton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

6 M. ANDERSON VS. PACIFIC COAST STEAMSHIP CO., ETC.

7 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1850.

M. ANDERSON, Appellant,

vs.

THE PACIFIC COAST STEAMSHIP COMPANY, a Corporation, Claimant of the Steamship "Queen," Her Engines, Boilers, Machinery, Tackle, Apparel, and Furniture, Appellee.

No. 1851.

N. JORDAN, Appellant,

vs.

THE PACIFIC COAST COMPANY, a Corporation, Claimant of the Steamship "Umatilla," Her Engines, Boilers, Machinery, Tackle, Apparel, and Furniture, Appellee.

*Certificate of Clerk U. S. Circuit Court of Appeals.*

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing six (6) pages, numbered from and including one (1) to and including six (6), to be a full, true and correct copy of a Certificate, this day filed by the United States Circuit Court of Appeals for the Ninth Circuit, Certifying Certain Questions to the Supreme Court of the United States Under Section 6 of the Act of Congress, approved March 3, 1891, in the above-entitled causes, as the original of said certificate remains on file and of record in my office.

8 Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 15th day of May, A. D. 1911.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,

*Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.*

9 [Endorsed:] Nos. 1850 & 1851. United States Circuit Court of Appeals for the Ninth Circuit. M. Anderson vs. The Pacific Coast Steamship Company, a corporation, Claimant, etc., and N. Jordan vs. The Pacific Coast Company, a Corporation, Claimant, etc. Certified Copy of Certificate of the United States Circuit Court of Appeals for the Ninth Circuit Under Section 6 of the Act of March 3, 1891, Certifying Certain Questions to the Supreme Court of the United States.

Endorsed on cover: File No. 22,717. U. S. Circuit Court Appeals, 9th Circuit. Term No. 641. M. Anderson vs. The Pacific Coast Steamship Company, claimant of the Steamship "Queen," &c. File No. 22,718. Term No. 642. N. Jordan vs. The Pacific Coast Company, claimant of the Steamship "Umatilla," &c. (Certificate.) Filed June 6th, 1911. File Nos. 22,717 and 22,718.

IN THE  
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

---

Nos. 641 and 642.

---

M. ANDERSON, APPELLANT,

*against*

PACIFIC COAST STEAMSHIP COMPANY,  
A CORPORATION, CLAIMANT OF THE STEAMSHIP  
"QUEEN," HER ENGINES, BOILERS, MACHINERY,  
TACKLE, APPAREL, AND FURNITURE, APPELLEE.

---

N. JORDAN, APPELLANT,

*against*

THE PACIFIC COAST COMPANY, A CORPORA-  
TION, CLAIMANT OF THE STEAMSHIP "UMA-  
TILLA," HER ENGINES, BOILERS, MACHINERY,  
TACKLE, APPAREL, AND FURNITURE, APPELLEE.

---

**MOTION TO ADVANCE.**

---

WILLIAM DENMAN,

*Counsel for Appellants.*

(22,717 and 22,718).

U. S. Supreme Court, U. S.  
FILED.

DEC 21 1911

JAMES H. MCKENNEY  
CLERK

IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

---

**No. 641.**

M. ANDERSON, APPELLANT,

*vs.*

THE PACIFIC COAST STEAMSHIP COM-  
PANY, A CORPORATION, ETC.

---

**No. 642.**

N. JORDAN, APPELLANT,

*vs.*

THE PACIFIC COAST COMPANY,  
A CORPORATION, ETC.

---

**MOTION TO ADVANCE.**

---

*To the Honorable the Justices of the Supreme  
Court of the United States:*

Now come M. Anderson and N. Jordan, appel-  
lants in the appeals from which the questions are  
certified to this court by the United States Circuit

There is filed herewith the petition of the Attorney General of the State of California, joining in the motion to advance.

Your petitioners therefore respectfully move that the hearing of the certified questions be so advanced that it will be had at this session of the court.

WILLIAM DENMAN,  
*Counsel for Appellants.*

IN THE SUPREME COURT OF THE  
UNITED STATES.

M. ANDERSON, *Appellant*,

*vs.*

THE PACIFIC COAST STEAMSHIP COMPANY, a Corporation, Claimant of the Steamship "Queen," Her Engines, Boilers, Machinery, Tackle, Apparel, and Furniture, *Appellee*.

N. JORDAN, *Appellant*,

*vs.*

THE PACIFIC COAST COMPANY, a Corporation, Claimant of the Steamship "Umatilla," Her Engines, Boilers, Machinery, Tackle, Apparel, and Furniture, *Appellee*.

*To the Honorable the Justices of the Supreme Court of the United States of America:*

Your petitioner respectfully represents:

That he is the Attorney General of the State of California; that he has read the certificate of the Circuit Court of Appeals to this Court filed in these causes, and is familiar with its contents; that the decision of the two causes at bar involves a question of conflict of jurisdiction between the State and Federal Governments as to the pilotage of steam vessels touching at both foreign and domestic ports on the one voyage, and is of particular importance to the State of California, as the conflict of jurisdiction involves a large number of registered steam vessels now engaged in traffic be-

tween ports of the Atlantic and Pacific coasts of the United States, both by way of the Isthmus of Tehuantepec, the Isthmus of Panama, and around South America.

The decision will also affect a very large number of registered steam vessels which are confidently expected to sail between American ports on the Atlantic and Pacific oceans via the Panama Canal.

Your petitioner therefore prays that on account of the importance of the interests involved in these causes, the hearing on the questions certified by the Circuit Court of Appeals be advanced on the calendar of this court to the earliest date which the court may deem proper.

And your petitioner will ever pray.

U. S. WEBB,  
*Attorney General of the  
State of California.*

IN THE SUPREME COURT OF THE  
UNITED STATES.

No. 641.

M. ANDERSON, *Appellant*,  
*vs.*

THE PACIFIC COAST STEAMSHIP COMPANY, a Corporation, Claimant of the Steamship "Queen," Her Engines, Boilers, Machinery, Tackle, Apparel, and Furniture, *Appellee*.

No. 642.

N. JORDAN, *Appellant*,  
*vs.*

THE PACIFIC COAST COMPANY, a Corporation, Claimant of the Steamship "Umatilla," Her Engines, Boilers, Machinery, Tackle, Apparel, and Furniture, *Appellee*.

*To the Pacific Coast Steamship Company and the Pacific Coast Company, and to Their Proctor, George W. Towle, Esquire:*

You, and each of you, will please take notice that M. Anderson and N. Jordan, appellants in the United States Circuit Court of Appeals, appearing here, will, on Wednesday, December 20, 1911, at the opening of court on the morning of that day, move this court to advance the hearing of the above causes upon its calendar; said motion will be based upon the statement of the importance and character of the interests involved as set forth in

the certification from the Circuit Court of Appeals for the Ninth Circuit.

WILLIAM DENMAN,  
*Proctor for M. Anderson.*  
WILLIAM DENMAN,  
*Proctor for N. Jordan.*

Receipt of a copy of the within notice is hereby admitted this 13th day of December, 1911.

GEO. W. TOWLE,  
*Proctor for Appellees in C. C. A.*

[Endorsed:] In the Supreme Court of the United States. M. Anderson, appellant, *vs.* The Pacific Coast Steamship Company, etc., appellee. N. Jordan, appellant, *vs.* The Pacific Coast Company, etc., appellee. Notice of motion. William Denman, attorney-at-law, proctor in admiralty, 454 California St., San Francisco, Cal.

# Supreme Court of the United States.

OCTOBER TERM, 1911.

M. ANDERSON,  
Appellant,

AGAINST

PACIFIC COAST STEAMSHIP COM-  
PANY, a Corporation, Claim-  
ant of the Steamship  
"QUEEN," her Engines, Boil-  
ers, Machinery, Tackle, Ap-  
parel and Furniture,  
Appellee.

No. 641.

N. JORDAN,  
Appellant,

AGAINST

THE PACIFIC COAST COM-  
PANY, a Corporation, Claim-  
ant of the Steamship  
"UMATHLA," her Engines,  
Boilers, Machinery, Tackle,  
Apparel and Furniture,  
Appellee.

No. 642.

A motion having been made by the proctor for the appellants to advance the hearing of the above causes, the undersigned, as proctor and counsel for the Pacific Coast Steamship Company and The Pacific Coast Company, the Appellees, respectfully represent to the Court as follows:

These causes come before the Supreme Court on certain questions certified by the Circuit Court of Appeals for the Ninth Circuit. There were involved

in these causes before the Circuit Court of Appeals certain important questions of law other than those stated in the certificate of the Circuit Court of Appeals, which we think should be considered and reviewed by the Supreme Court. We accordingly desire to apply to the Supreme Court for an order requiring that the whole record and cause be sent up to it for its consideration in accordance with the provisions of Section 6 of the Circuit Court of Appeals Act. We have already taken steps in preparation for this motion, the necessary copies of the record required for such purpose by Rule 37 of the Supreme Court having already been shipped by express from California to New York.

The appellees have no serious objection to the advancement of the hearing of these causes, provided that they are still allowed time to make the motion that the whole record and cause be sent up to the Supreme Court for its consideration, and if such motion is granted, to file the necessary papers with the Clerk of the Supreme Court, and thereafter to properly prepare for the argument of the whole case.

Inasmuch as some time may be required for this purpose, we ask that the motion to advance the hearing of the causes be denied at the present time, or that, if granted, the date fixed for the hearing be not earlier than about the middle of February, 1912.

Respectfully submitted,

GEORGE W. TOWLE,

Proctor.

THOMAS THACHER,

GRAHAM SUMNER,

Counsel for Pacific Coast Steamship Company  
and

The Pacific Coast Company,

Appellees.

# In the Supreme Court

OF THE  
**United States**

Office Supreme Court, U. S.  
FILED.

FEB 17 1912

M. ANDERSON,

*Appellant.*

JAMES H. MCKENNEY,  
CLERK.

vs.

THE PACIFIC COAST STEAMSHIP COMPANY (a corporation), Claimant of the Steamship "QUEEN", her Engines, Boilers, Machinery, Tackle, Apparel and Furniture,  
*Appellee.*

No. 641

N. JORDAN,

*Appellant,*

vs.

THE PACIFIC COAST COMPANY (a corporation), Claimant of the Steamship "UMATILLA", her Engines, Boilers, Machinery, Tackle, Apparel and Furniture,  
*Appellee.*

No. 642

**Opening Brief for Appellants—San Francisco  
Bar Pilots—Covering Both Appeals.**

WILLIAM DENMAN,

*Proctor for Appellants.*

Filed this \_\_\_\_\_ day of February, 1912.

JAMES H. MCKENNEY, Clerk.

By \_\_\_\_\_ Deputy Clerk.



# In the Supreme Court

OF THE

## United States

---

M. ANDERSON,

*Appellant,*

vs.

THE PACIFIC COAST STEAMSHIP COMPANY (a corporation), Claimant of the Steamship "QUEEN", her Engines, Boilers, Machinery, Tackle, Apparel and Furniture,

*Appellee.*

No. 641

N. JORDAN,

*Appellant,*

vs.

THE PACIFIC COAST COMPANY (a corporation), Claimant of the Steamship "UMATILLA", her Engines, Boilers, Machinery, Tackle, Apparel and Furniture,

*Appellee.*

No. 642

**Opening Brief for Appellants—San Francisco Bar Pilots—Covering Both Appeals.**

### Preliminary Statement.

This matter is before the Court on a certification of four questions by the Circuit Court of Appeals for the Ninth Circuit. The first three questions concern the interpretation of a single act, Section 51 of the Act of Feb. 28, 1871, "for the better security of life on vessels propelled by steam", in so far as it affects the power of the State of California to charge a fee against the class of long voyaged registered steam vessels for furnishing a resident bar pilot service to such vessels entering and leaving the port of San Francisco.

The fourth question is practically the certification of the whole case and for that reason and because its answer necessarily follows from the answers of the first three, we have given it but minor consideration in this brief.

Four opinions were written in the cause before the questions were certified, *three of them ignoring entirely Sec. 51 of the Act of 1871* and treating the two sections of the statutes into which it was re-enacted as separate enactments, and without any regard to the history of their origin or to the condition of registered coastwise commerce in 1871, when the act was passed, or in 1873 when it was re-enacted.

We will later consider these opinions more at length, but for the present it is enough to point out that in certifying the questions in the form they have, they have abandoned their treatment of the sections of the Revised Statutes as isolated enactments, and have asked this Court to give its opinion on the original section of the

act "for the better security of life" on steam vessels. This abandonment of the isolated treatment of the opinion and adoption of the historical method, is emphasized by the form of the certificate, where Sec. 51 of the Act of 1871 and 4401 and 4444 of the Revised Statutes are printed in parallel columns (Certificate p. 3) and each other act referred to is the original act, the codification being merely a parenthetical addition (Certificate p. 4).

That the intent of the legislation must be determined by the original act rather than the codification, is an elementary rule of statutory construction repeatedly recognized by this Court.

In *Logan v. United States*, Mr. Justice Gray, speaking for the Supreme Court, after reviewing certain decisions of this Court on original acts of Congress subsequently re-enacted in the Revised Statutes, says:

"The combination and transposition of the provisions of 1862, 1864 and 1865, in a single section of the Revised Statutes, putting the two provisos of the later statutes first, and the general rule of the earlier statute last, but hardly changing the words of either, except so far as necessary to connect them together, cannot be held to have altered the scope and purpose of these enactments, or of any of them. It is not to be inferred that Congress, in revising and consolidating the statutes, intended to change their effect, unless an intention to do so is clearly expressed. *Potter v. Third Nat. Bank of Chicago*, 102 U. S. 163 (26: 111); *McDonald v. Hovey*, 110 U. S. 619 (28: 269); *United States v. Ryder*, 110 U. S. 729, 740 (28: 308, 312)."

*Logan v. United States*, 144 U. S. 263, at 302.

The section of the act to be construed reads as follows:

“An Act to provide for the Better Security of Life on Board of Vessels Propelled in Whole or in Part by Steam.”

“Section 51. And be it further enacted that \* \* \* every coastwise sea-going steam vessel subject to the navigation laws of the United States, and to the rules and regulations aforesaid, *not sailing under register*, shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats. \* \* \* Nor shall any pilot charges be levied by any such (State) authority upon *any steamer piloted as herein provided*. \* \* \* Provided, however, that nothing in this act shall be construed to annul or affect any regulation established by the laws of any State requiring vessels entering or leaving a port in any such State, other than coastwise steam vessels, to take a pilot duly licensed, or authorized by the laws of such State, or of a State situate upon the waters of such State.” (The above in a single paragraph. Italics ours.)  
16 U. S. Statutes at Large p. 455.

The primary matter to be determined by the Court then is, what was the condition of “steam vessel” carriage in the year 1871, first, with reference to the pilotage afforded such vessels when entering or sailing on inland waters (i. e., not “on the high seas”) and second, with reference to the reason for a classification of coastwise vessels into those “not sailing under register” (i. e., merely “licensed”) and those which are registered. What purpose had Congress in view in limiting the control of the pilots created by the federal authority to those coastwise vessels only which were “not

sailing under register", and when those vessels had left the "high seas" and were crossing the bars and navigating the dangerous narrows and tortuous channels of the bays, rivers and ports of the United States as they were in the year 1871?

It is our purpose to show as a preliminary to the consideration of any of the certified questions—

A. That there are two great classes of pilots in the United States, bar pilots, residential at the bars and entrances to inland waters, in constant and familiar touch with the changing conditions of such waters; and the ships' officers holding federal pilots' licenses, constantly sailing with their vessels, having a general knowledge of such waters but necessarily knowing nothing of changes which have taken place while they were on voyages;

B. That the United States had not in 1871 established any residential bar pilotage system; that it did not then have any laws intended for that purpose, and that it has not as yet created such a system;

C. That the various maritime States of the Union have from the beginning of their organization maintained residential bar pilots for piloting over bars and in inland waters tributary to the high seas;

D. That in 1871 the "*registered*" steamers in the coastwise trade were, as a class, engaged in *long* voyages in the carriage of goods between the Atlantic and Pacific ports of the United States or between the Gulf of Mexico and northern Atlantic ports; while the coastwise vessels "not sailing under register" (i. e., merely

licensed) were engaged in short domestic voyages to nearby ports;

E. That Congress, when it drew the distinction between registered and unregistered (or licensed) coastwise vessels, was drawing the distinction between long voyages and short voyages. It was with a view to the "security of life" on steam vessels that Congress gave the pilotage of the long voyaged registered vessels to the State residential pilots, and allowed only the short voyaged licensed vessels to come in with one of the ship's officers holding a federal license, because his shorter absences from these waters would render him less unfamiliar with the changing conditions of entrance and inland channels.

## I.

## **The Federal Government Had Not Established Any System of Residential Bar Pilotage in 1871 and Has Not Since That Time.**

The Act of Feb. 28, 1871, did not create the federal pilotage system so far as it concerns the licensing of pilots. Its provisions add nothing to those of the Act of 1852 (10 Statutes at Large 67). The provisions of the two acts are placed in parallel columns below:

### **PILOTAGE ACT, 1852:**

"SECTION NINTH. Whenever any person claiming to be a skillful pilot for any such vessel (i. e., steam vessel carrying passengers) shall offer himself for a license, the said board (i. e., inspectors) shall make diligent inquiry as to his character and merits; and if satisfied that he possesses the requisite skill, and is trustworthy and faithful, give him a certificate to that effect, licensing him for one year to be a pilot of any such vessels within the limit prescribed in the certificate; \* \* \*

"SEC. 7. \* \* \* The inspectors shall license and classify all engineers and pilots of steamers carrying passengers.

"SECTION TENTH. It shall be unlawful for any person to employ, or any person to serve as engineer, or pilot, on any such vessel who is not licensed

### **R. S. SEC. 4442:**

Whenever any person claiming to be a skillful pilot for steam vessels offers himself for a license the inspectors shall make diligent inquiry as to his character and merits, and if satisfied from personal examination of the applicant, with the proof that he offers, that he possesses the requisite knowledge and skill and is trustworthy and faithful, they shall grant him a license for the term of one year to pilot any such vessel within the limits prescribed in the license."

### **R. S. SEC. 4438:**

"The boards of local inspectors, shall license and classify the masters, chief mates, engineers, and pilots of all steam vessels. It shall be unlawful to employ any person, or for any person to serve, as a master, chief mate, engineer, or pilot, on any steamer, who is not li-

by the inspectors, and any one so offending shall forfeit one hundred dollars for each offense; provided", etc. (Act 1852, 10 Statutes at Large 67). censed by the inspectors; and anyone violating this section shall be liable to a penalty of one hundred dollars for each offense."

It thus appears that the laws creating and regulating federal pilotage were in 1871 and *are today* as they were in 1852.

In the early fifties California had created a residential bar pilotage system for the port of San Francisco. Speaking of the system thus created this Court said:

"The object of the regulations established by the statute, was to create a body of hardy skillful seamen, thoroughly acquainted with the harbor, to pilot vessels seeking to enter or depart from the port, and thus give security to life and property exposed to the dangers of a difficult navigation. This object would be in a great degree defeated if the selection of a pilot were left to the option of the master of the vessel, or if the exertions of a pilot to reach the vessel in order to tender his services were without any remuneration. The experience of all commercial States has shown the necessity, in order to create and maintain an efficient class of pilots, of providing compensation not only when the services tendered are accepted by the master of the vessel, but also when they are declined."

*Pac. Mail S. S. Co v. Joliffe*, 2 Wallace 450, at 456.

That case came before this Court in 1864. The question then was, had the Act of 1852 (which was the law in 1871, was codified in the Revised Statutes and is the law today) created a body of pilots to displace the state residential pilotage systems?

This Court in an illuminating opinion held squarely that it had not.

Mr. Justice Field, speaking for the Court, says:

“The Act (of 1852) contains few provisions relating to pilots; indeed, it was not directed to the remedy of any evils of the local pilot system. There were no complaints against the port pilots; on the contrary, they were subjects of just praise for their skill, energy and efficiency. The clauses respecting pilots in the Act relate, in our judgment, to pilots having charge of steamers on the voyage, and not to port pilots; and the provision that no person shall be employed or serve as a pilot who is not licensed by the inspectors has reference to employment and service on the voyage generally, and not to employment and service in connection with ports and harbors.”

“The term ‘pilots’ is equally applicable to two classes of persons—to those whose employment is to guide vessels in and out of ports, and to those who are intrusted with the management of the helm and the direction of the vessel on her voyage. *Abb. Shipp.*, 195; *Bouvier’s Law Dic.* term Pilots. To the first class, for the proper performance of their duties, a thorough knowledge of the port in which they are employed is essential, with its channel, currents and tides, and its bars, shoals and rocks, and the various fluctuations and changes to which it is subject. To the second class, knowledge of an entirely different character is necessary. Yet the Act in question does not require the inspectors, who are to license pilots under its provisions, to possess any knowledge of the harbors for which, under the theory of the plaintiff in error, pilots are to be licensed, or to exact any such knowledge from the pilots themselves. They are to issue their license to a pilot when satisfied, from ‘inquiry as to his character and merits’, that he ‘possesses the requisite skill, and is trustworthy and faithful’. The qualifications thus required may be sufficient for the

pilot of the steamer on her voyage at sea, but are entirely insufficient for the intricacies of harbor navigation.

\* \* \* \* \*

“THE ACT DOES NOT PURPOSE TO ESTABLISH REGULATIONS FOR PORT PILOTAGE: AND WE CANNOT SUPPOSE THAT IN A MEASURE INTENDED TO GIVE GREATER SECURITY TO LIFE CONGRESS WOULD HAVE SWEEPED AWAY ALL THE SAFEGUARDS IN THIS RESPECT PROVIDED BY THE STATE LEGISLATURE WITHOUT SUBSTITUTING ANYTHING IN THEIR PLACE.

“Under the Act the ports may be left entirely without resident or local pilots, for it does not require the appointment of such pilots, though the necessity for them must have been obvious. Having omitted this important requirement, the Act omits, of course, all provisions as to the number of pilots, their duties, responsibilities, and compensation. These are matters of the greatest consequence, are contained in all state regulations, and without them no effective system can ever be established.”

*Joliffe v. Pacific Mail S. S. Co.*, 2 Wall. 450, at 461, 462, 463.

Nothing new has been added by Congress to the provisions for the federal pilotage establishment up to the present date, much less in 1871, when the provisions of Section 51 were passed in one paragraph of the pilotage act of that year, and in the light of which period the act must be construed.

It is equally significant that in no place in the United States have the federal supervising inspectors attempted to create a residential bar pilotage establishment. In all the districts they recognize, to this day, the local

residential organizations and in this they are but following the Act of 1789 still in force in Revised Statute 4235.

“Until further provision is made by Congress, all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the States respectively wherein such pilots may be, or with such laws as the States may respectively enact for the purpose.”

Enacted August 1789, New R. S. 4235.

Furthermore there is no class of men acting as federal pilots, as such, the license being universally taken out by the ships' officers under Section 18 of the Act of 1871 in question (now R. S. 4443).

In construing Section 51 of the Act of Feb. 28, 1871, referred to in the first three of the certified questions, we must then always bear in mind that there was no federal system of bar pilotage at the Hell Gate, at New York (as it then was), in the Schuylkill River and Delaware Bay with its eighty miles of pilotage from the Capes of Delaware to the docks at Philadelphia, in Charlestown Harbor, in Chesapeake Bay, in Mobile Bay, in the forks of the Mississippi leading to New Orleans, in San Francisco harbor (Arch and Blossom Rocks had not then been removed) and at the Columbia River Bar, then without its jetty.

Any classification of vessels made by Congress at this time must be construed with reference to the “security of life” on vessels when they left the high seas and entered these dangerous inland waters. In our next section we will proceed to so construe it.

## II.

**Congress in the Act of 1871 for the Security of Life Classified Coastwise Steamers Into Those "Registered" and Those "Not Sailing Under Register" Because the Former, as a Class, Were on Long Voyages Where the Federal Pilots on Board Would Lose Touch With Bar and Channel Conditions, and the Latter, as a Class, Were on Short Voyages Where They Would Not.**

Under American shipping law, our vessels are classified into two great classes, "registered" vessels which alone may engage in the foreign trade and "enrolled and licensed" vessels which are confined to coastwise domestic voyages or the fisheries.

*Parsons on Shipping*, page 31.

Very early in the history of our commerce the vessels in the extensive cotton and sugar trade from the cities of the Gulf of Mexico, Savannah and Charlestown to Baltimore, Philadelphia, New York and other north Atlantic ports, found that although their goods were carried almost entirely "coastwise" they would frequently have to stop for various necessities at Havana or some other port of the West Indies. Incidentally some trading was done while in port. The commerce of that time was in sailing vessels, often blown far off their courses. As they were foreign vessels in these West Indian ports they were required to produce a register to comply with the universal maritime law. Their coasting enrollment and license were not sufficient. As early as in the year 1793 registered vessels were allowed to trade coastwise.

This enactment, which still survives in R. S. 4361, was thus the law nearly half a century before Congress created *any* federal pilots.

In other words Congress has from the first recognized the *registered* vessel as of a class sailing on the *longer* voyages, where the vessel is likely to touch at foreign ports.

Such was the condition of the law until the conclusion of the Mexican War and acquisition of California.

On the 27th day of May, 1848, only ten weeks after the treaty of Guadalupe Hidalgo had provided for the annexation of California, Congress enacted a law permitting coastwise vessels, if sailing under register, to touch and trade at foreign ports en route between domestic ports. The provision now (R. S. 3126) reads as follows:

“Any vessel, on being duly registered in pursuance of the laws of the United States, may engage in trade between one port in the United States and one or more ports within the same, with the privilege of touching at one or more foreign ports during the voyage, and land and take in thereat merchandise, passengers and their baggage, and letters and mails. All such vessels shall be furnished by the collectors of the ports at which they shall take in their cargoes in the United States, with certified manifests, setting forth the particulars of the cargoes, the marks, number of packages, by whom shipped, to whom consigned, at what port to be delivered; designating such merchandise as is entitled to drawback, or to the privilege of being placed in warehouse; and the masters of all such vessels shall, on their arrival at any port of the United States from any foreign port at which such vessel may have touched, as herein provided, conform to

the laws providing for the delivery of manifests of cargo and passengers taken on board at such foreign port, and all other laws regulating the report and entry of vessels from foreign ports, and be subject to all the penalties therein prescribed."

The enactment of such a statute at such a time could have had but one purpose in view; the facilitating of commercial intercourse between the Atlantic and Pacific possessions of the United States. To say that Congress then had in mind the San Francisco-Vancouver trade is absurd.

As Congress expected, a very large commerce sprang up between California and these eastern ports whose harbors we have referred to, a trade which was at once *coastwise* and required touching at foreign ports in Central and South America and the West Indies. Many lines of steamers and clipper ships were formed, among them the Pacific Mail Steamship Company, which has survived to this day.

In 1854, when the Panama Railway was under construction, Congress recognized that a part of this Magellan and around the Horn trade would cross the Isthmus. In that year it enacted a statute providing for customs inspectors resident in Panama to inspect the landing and embarking of trans-Isthmian traffic between American ports on the Pacific and the Atlantic which it expressly denominates as "*coastwise*" traffic. The language of the statute is as follows:

"\* \* \* The Secretary of the Treasury may appoint special sworn agents as inspectors of customs to reside in such foreign territory where such merchandise may be landed or embarked with

power to superintend the landing or shipping of all merchandise, *passing coastwise between the ports of the United States on the Pacific and the Atlantic.*"

Act of March 28, 1854, Ch. 30, 10 Stats. at Large 272, now R. S. 2999.

The growth of the coastwise trade between California and Atlantic ports both around South America and via Panama through the Pacific Mail and other steamship companies is familiar history. Surely no United States Court sitting in admiralty can refuse to take judicial notice of its great proportions.

Its distinguishing features, as far as this case is concerned, are that it was a coastwise trade, *of very long voyages at sea*, and had to be conducted in vessels under register which could touch at foreign ports.

We should then naturally expect to find in the Congressional pilotage laws a separate classification for vessels in this long voyage coastwise trade, where the officers and pilots would become as unfamiliar with bar and channel conditions at the ports they touch at, as they would in voyages to foreign countries.

And we should naturally expect in view of the fact that the federal laws provided for no residential pilotage system, that these vessels would be left to the care of the residential bar pilotage establishments which had been created by the law of almost every maritime State in the Union.

Let us now turn to the first of the certified questions, having in mind the clear distinction between the long

voyages of *registered* vessels in the coastwise trade between the dangerous ports of the Atlantic and Pacific and of the Gulf and the north Atlantic, and the much shorter voyages of the coastwise vessels "*not sailing under register*", whose frequent trips in and out nearby ports made their officers much more familiar with bar and entrance conditions.

## III.

### The First Question Must be Answered in the Negative.

The first question certified here is as follows:

1. Are coastwise sea-going steam vessels, sailing under register, and having officers with federal pilots' licenses, free from any liability for pilotage fees created by Sections 2468, 2466 and 2432 of the Political Code of the State of California, upon the proper tender of services of resident bar pilots of the State pilotage establishment, when entering or leaving the port of San Francisco, by virtue of Section 51 of the Act of February 28, 1871, entitled "An Act to Provide for the Better Security of Life on Board of Vessels Propelled in Whole or in Part by Steam", as re-enacted of date December 1, 1873, in Sections 4401 and 4444 of the Revised Statutes?

The text of the act referred to in the question is as follows:

"Section 51. And be it further enacted that \* \* \* every coastwise sea-going steam vessel subject to the navigation laws of the United States, and to the rule and regulations aforesaid, *not sailing under register*, shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats. \* \* \* Nor shall any pilot charges be levied by any such (State) authority upon *any steamer piloted as herein provided*. \* \* \* Provided, however, that nothing in this act *shall be construed* to annul or affect any regulation established by the laws of any State requiring vessels entering or leaving a port in any such State, other than coastwise steam vessels, to take a pilot duly

licensed, or authorized by the laws of such State, or of a State situate upon the waters of such State."

(The above in a single paragraph.)

Now the first important thing to notice is, that Section 51 applies to but a single group of vessels at a certain time of the voyage, namely, "coastwise sea-going vessels" "not sailing under register" and when not "on the high seas". In other words, it has direct reference to the dangerous portion of the voyage, i. e., at the entrance to ports and in inland waters, and it gives control of coastwise vessels to these federal pilots *only* on those voyages on which they are "not sailing under register".

The next important thing is that the State is prohibited from levying pilotage charges only when the "steamer is piloted as herein provided". That is to say, no power is taken away from the State save when the steamer is "not sailing under register", as that is the only provision "herein" for federal pilotage. The statute by its express terms takes no vessel from the control of the resident State pilots in these dangerous waters save in the one contingency provided, i. e., that she has not been sailing on long registered voyages which would make her officers with the federal licenses unfamiliar with their shifting channels and changing conditions due to freshets, alteration of lights, fog-horns, etc.

By its express terms, the statute does not affect coastwise steamers sailing under register. By every reason which could concern the "better security of lives" on

steam vessels, they should not have been taken from the control of the residential bar pilots and should not hereafter be, until the federal government has established residential systems at all dangerous ports.

A third matter to be considered is the peculiar wording of the last clause, i. e., "that nothing in this act *shall be construed* to annul or affect any regulation established by the laws of any State requiring vessels entering or leaving a port in any such State other than coastwise steam vessels to take" a State pilot. The significant thing about this clause is that it does not by its terms remove any vessel from State control, but merely sets a limit as to the class of vessels which shall be *construed* as affected by the act. Its use of the general term "coastwise steam vessels" cannot by any rule of interpretation, enlarge the specific term "coastwise sea-going steam vessels *not sailing under register*". As this clause is directly involved in the second certified question, we consider it more at length in the next section.

It is thus clear that whether we construe Section 51 of the Act of Feb. 28, 1871 on its face alone, or with regard to the history of federal pilotage laws and of the commerce controlled by them, the first certified question must be answered in the negative.

An examination of the authorities shows us that there is nothing in the cases which compels us to adopt any other view.

### The Authorities.

It is of great significance that since the case of *Joslyn v. Nickerson*, the first federal case construing the act, in which Judge Lowell says that the coastwise vessel when *sailing under register* is subject to State pilotage laws, not a decision in this or any other Court (that we have been able to find) has questioned the State's right to control the pilotage of all registered steamers, coastwise or foreign. Nor is there even a dictum to that effect in any case construing Section 4401 with which Section 4444 must be construed as to registered coasters. The codified sections of the act have been repeatedly before this Court in cases involving the pilotage of *enrolled* and *licensed* coastwise steamers, and the ruling has been that they are to be controlled by the federal pilots. In nearly every case, however, the distinction has been made between "registered" steamers and those enrolled and licensed and hence "not sailing under register".

Surely with all the tremendous tonnage sailing coastwise under register between the Gulf and Baltimore, Philadelphia and New York, or between the ports on the Atlantic and the Pacific, some one of the great steamship companies would have questioned the State's control of these vessels which the statutes of all these States give to their residential bar pilots. It may be urged that the danger to the steamers entering any one of these ports is so great, when their officers have been for weeks away from them on those long coastwise voyages, that of course their owners are glad to avail themselves of the residential pilots. This however is

but confessing the necessity which Congress must have recognized when it passed the Act of 1871.

In the case of *Joslyn v. Nickerson*, Judge Lowell, after reviewing the history of the federal pilotage laws, says:

“This statute has been modified, and the employment of such a pilot is now compulsory only upon coasting steam vessels *not sailing under a register*. Rev. St. 4401; *Murray v. Clark*, 4 Daly 468, affirmed, 58 N. Y. 684. This vessel, therefore, was not bound to carry such a pilot, and was bound by any law of Massachusetts which might require her to take a local pilot. Rev. St. 4444.” (Italics ours.)

*Joslyn v. Nickerson*, 1 Fed. 133, at 135.

The opinion is significant not only for the conclusion reached but because it makes R. S. 4401 (which embodies the first part of Section 51 of the Act) determine the limitation of the State's power as imposed by Congress, to coastwise vessels not sailing under register.

The case relied on by Judge Lowell was one decided by Chief Justice Daly of New York and affirmed by the Court of Appeals. As this decision is the only one which holds squarely on the subject and as it presents our exact line of reasoning with all the force and clarity of that distinguished Judge, we print it here in full:

“BY THE COURT.—DALY, CH. J.—The facts stated in the plaintiff's affidavit were sufficient to warrant a finding that the plaintiff was, within the meaning of the State law of April 3, 1857, §29, the pilot first speaking or offering his services to pilot the vessel. The remaining question is, whether the vessel was a ‘coastwise steam vessel,’ within the meaning of the 51st section of the United States act of February 28, 1871.

“That section provides that all vessels propelled in whole or in part by steam, when navigating within the jurisdiction of the United States, shall be subject to the rules and regulations established by the United States for the government of steam vessels, and that every coastwise seagoing steam vessel, subject to such rules and regulations, and to the navigation laws of the United States, *not sailing under register*, shall, when under way, except upon the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats. This section further declares that no pilot charges shall, by the authority of any State or municipal government, be levied upon any steamer piloted as therein provided for, and a subsequent provision in declaring that nothing in the act of 1871 shall be construed to annul or affect any regulation established by the laws of any State requiring vessels entering or leaving a port in that State to take a pilot, expressly excepts ‘coastwise steam vessels’ from the operation of this saving clause. It follows, from these provisions, that coastwise seagoing steam vessels cannot, by any law of the State, be compelled to take a State pilot upon entering or leaving any port in this State, such vessels being piloted by pilots licensed by the inspectors of steamboats under the law of the United States, it being well settled that this is a matter within the exclusive authority of the government of the United States, if it thinks proper to exercise it; and any law enacted by the general government upon this subject, supersedes the authority of any State law that may be, in whole or in part, inconsistent with it (*Steamship Company v. Joliffe*, 2 Wall. 450; *Cisco v. Rogers*, 36 N. Y. 292; *Sturgis v. Spofford*, 45 Id. 446).

“The question then presented is what is meant in this provision by a ‘coastwise seagoing steam vessel’, and it appears to me that the section itself gives the explanation by the language ‘not sailing under register’. Under the various laws of the

United States, collectively known as the registering acts, vessels obtain their national character by being registered, enrolled or licensed. If under twenty tons, they may be licensed only. If twenty tons or over and they are to be employed in the coasting trade, the whale or the cod fishery, they must be both licensed and enrolled, and the license must be renewed annually (Act of February 19th, 1793, §§ 1, 4, 5) and for any trade or purpose beyond this they are registered (Act of December 31st, 1792). Our laws do not positively require registration or enrollment, but until a vessel is registered or enrolled she is not an American ship. If she engages in the foreign, the coasting trade, or the fisheries, she is liable to forfeiture and as she cannot, without her proper papers, have the privileges of a foreign or an American vessel, her registry or enrollment becomes a practical necessity. When this statute, therefore, refers to a coastwise seagoing steam vessel, not sailing under registry, it must mean one that is enrolled and licensed for the coasting trade in the manner provided by law, whose license is renewable annually; a vessel sailing from one part of the coast of the United States to another, or which is employed in the whale or coast fisheries. It certainly does not refer to a registered vessel that may trade or sail to any part of the world, as it expressly declares 'not sailing under registry'.

"It appears to have been the design of the act to require steam vessels of this description to be under the control and direction of pilots licensed by the inspectors of steamboats. Making frequent voyages, and sailing in and out of ports upon our coast at short intervals, they are, for the better security of life upon such vessels (Act of February 28, 1871, title and sections 14, 15, 19, 51) required, when under way and not upon the high seas, to be under the control and direction of the peculiar class of pilots provided for by this act; and as these pilots have charge of them when entering or coming out of the ports of this State, there is no occasion for the services of State pilots. To distinguish them from all

other steam vessels, they are, as I have stated, described in the act as 'coastwise seagoing steam vessels, not sailing under registry'.

"The State pilot law of April 24th, 1867, in no way conflicts with the provision of the United States act; the eleventh section of the State law imposing the obligation of taking a pilot licensed by the State board, only upon the masters of foreign vessels, vessels coming from a foreign port, and vessels sailing under registry.

"A coastwise vessel is one sailing by the way of, or along a coast. In a certain sense, the St. Louis was a vessel of this description. For a year previous to the commencement of this suit she was employed as one of a line of steamers running regularly between New York and New Orleans, but was not necessarily limited to running by the way of, or to and from ports upon our coast. She was a registered vessel, and being so, was privileged to go to or stop at foreign ports, and did so. Upon two occasions she stopped at other ports, one being the voyage in question, when she stopped Havana upon her voyage from New Orleans to New York, and when the plaintiff offered his services, she was, in the language of the State law, both a registered vessel and coming from a foreign port, Havana. If she had been an unregistered vessel, the casual circumstance of her stopping at a foreign port from stress of weather or other justifiable cause, not in the way of business or traffic, would not affect her specific character under the United States act as a coastwise seagoing steam vessel, not sailing under register. But being a registered vessel, she stopped at Havana as she was privileged to do, and for all that appears may have done so not from necessity, but in the course of business. The admission states that upon the voyage in question she was under the control and direction of her master, who was a pilot duly licensed by the inspectors of steamboats, according to the United States act of 1871. I do not think that this affects the question, whether she

was or was not the kind of vessel provided for by that act; for if she were not, she would not become so by the inspectors of steamboats licensing her master as a pilot under the United States act. That was a privilege, office, or right personal to him, which in no way attached to the vessel, if she were not of the description of class required by that act to be under the direction and control of such a pilot, when not upon the high seas.

“The judgment, I think, should, therefore, be affirmed.

“Judgment affirmed.”

*Murray v. Clark*, 4 Daly 468 at 473; affirmed 58 N. Y. 684.

Judge Lowell's and Judge Daly's analysis of the Act of 1871 and its codification, is agreed in by Judge Gilbert, the senior judge in the Court below. As Judge Gilbert's decision disagreed with that of his colleagues, and as it was no doubt chiefly the strength of the position taken by him, which finally led to the certification here, we print the full text of his opinion.

“GILBERT, Circuit Judge (dissenting). The question involved in this case depends wholly upon the construction of sections 4401 and 4444 of the Revised Statutes. In those two sections is to be found the full measure of congressional legislation on the subject of pilotage, and the full extent of the federal delimitation of state power. Section 4361, which appears under a different title, and which subjects registered vessels engaged in the coasting trade to the same regulations, provisions, penalties, forfeitures, and duties as are imposed on licensed vessels in the coasting trade, has no reference whatever to pilotage regulations. This is made plain by referring to the original act of February 18, 1793 (1 Stat. 313, c. 8, §20), in which it specifically appears that the regulations, provisions, duties, etc.,

so referred to concern only the carriage of goods and more particularly distilled liquors, and the duty of masters to make manifests thereof. No new meaning was given to that statute by carrying its provisions into the Revised Statutes as section 4361. 'It will not be inferred that the Legislature, in revising and consolidating the laws, intended to change their policy, unless such intention be clearly expressed' (*United States v. Ryder*, 110 U. S. 729, 4 Sup. Ct. 196, 28 L. Ed. 308), and 'upon a revision of statutes, a different interpretation is not to be given to them without some substantial change of phraseology' (*McDonald v. Hovey*, 110 U. S. 619, 4 Sup. Ct. 142, 28 L. Ed. 269). And it is an established canon of construction that, in finding the meaning of a statute in the revision, the courts are permitted to refer to the original statute from which the section was taken to ascertain from its language and context to what class of cases the provision was intended to apply. *The Conqueror*, 166 U. S. 122, 17 Sup. Ct. 510, 41 L. Ed. 937.

"It is to be borne in mind that, while federal authority over pilotage is paramount to that of the state, the state power does not act by authority delegated by Congress, and the question is, not what has Congress authorized the states to do, but what has Congress taken from the states by its own regulation of pilotage? In *Gibbons v. Odgen*, 9 Wheat. 207, 6 L. Ed. 23, it was said:

"Although Congress cannot enable a state to legislate, Congress may adopt the provisions of a state on any subject. When the government of the Union was brought into existence, it found a system for the regulations of its pilots in full force in every state. The act which has been mentioned (Act Aug. 7, 1789, c. 9, §4, 1 Stat. 54, re-enacted in section 4235, Rev. St.) adopts this system and gives it the same validity as if its provisions had been specially made by Congress. \* \* \* The act unquestionably manifests an intention to leave this subject entirely to the states until Congress should think proper to interpose.'

"In *Cooley v. Board of Wardens of Philadelphia*, 12 How. 299, 319, 13 L. Ed. 996, the court said:

"The act of 1789 contains a clear and authoritative declaration by the First Congress that the nature of this subject is such that, until Congress should find it necessary to exert its powers, it should be left to the legislation of the states; that it is local, and not national; that it is likely to be the best provided for, not by one system or plan of regulations, but by as many as the legislative discretion of the several states should deem applicable to the local peculiarities of the ports within their limits."

"Approaching the question in issue with these principles in mind, it seems clear to me that section 4401 places under the protection of federal licensed pilots, except when on the high seas, all coastwise steam vessels, 'not sailing under register,' and that while section 4444 recognizes the power of the state to regulate pilotage, when entering or leaving its ports, of all vessels other than 'coastwise steam vessels,' the coastwise steam vessels so excluded from state legislation are those and those only which are placed under federal regulation under section 4401, namely, coastwise steam vessels, 'not sailing under register'. Section 4401 is the only federal statute placing vessels under the control of federal pilots while entering or leaving ports, and section 4444, being part of the same statute, is to be construed with it. Both these sections originally appeared as a single section in the act of 1871, entitled 'An act for the better protection of life, etc.' Act Feb. 28, 1871, c. 100, §51, 16 Stat. 455. The field of legislation which Congress might have covered by pilotage regulations comprised three classes of vessels: First, licensed and enrolled vessels engaged in the coasting trade; second, registered vessels engaged partly in coasting trade and partly in foreign commerce; and, third, registered vessels engaged wholly in foreign trade. Congress saw fit to regulate ves-

sels of the first class only, and has never made any specific provision for vessels of the other two classes. It has left them to state regulation.

“This was the view taken by Judge Lowell in 1880, in *Joslyn v. Nickerson* (C. C.) 1 Fed. 133, when he said, referring to Act July 25, 1866, c. 234, §9, 14 Stat. 228:

“‘This statute has been modified, and the employment of such a pilot is now compulsory only upon coasting steam vessels not sailing under a register. Rev. St. §4401.’

“And the learned judge cited *Murray v. Clark*, 4 Daly, 468, affirmed in 58 N. Y. 684, a case in which the meaning of sections 4401 and 4444 was discussed at length, and in which it was held that the state might impose a pilotage charge on registered vessels which are also engaged in the coasting trade, and that the rules and regulations established by the United States refer only to coastwise steaming vessels, not sailing under register. In *Bigley v. New York P. R. S. S. Co.* (D. C.) 105 Fed. 74, Judge Brown said that the effect of sections 4401 and 4444 was—

“‘to exempt all steam vessels sailing under a license and employed in the coastwise trade from the pilotage laws of the states, while other vessels remained subject to the state laws.’

“‘This seems to be the view which was taken in *Sprague v. Thompson*, 118 U. S. 90, 6 Sup. Ct. 988, 30 L. Ed. 115; and the later cases of *Huns v. New York*, etc., S. S. Co., 182 U. S. 395, 21 Sup. Ct. 827, 45 L. Ed. 1146, and *Olsen v. Smith*, 195 U. S. 332, 25 Sup. Ct. 52, 49 L. Ed. 224, are not in conflict with it.’

*The Queen*, 186 Fed. 725, at 735.

We now come to the three cases in this Court which have considered Revised Statutes 4401 and 4444, the

codification of the act referred to in the certified questions. Those cases are:

*Sprague v. Thompson*, 118 U. S. 90;

*Huus v. New York & Porto Rico S. S. Co.*, 182 U. S. 392;

*Olsen v. Smith*, 195 U. S. 332.

In no one of these cases was the question of the pilotage of a registered coastwise steamer before the Court. In the first two the vessel was a licensed and enrolled coaster, and in the third a British ship.

Now it is apparent that the resident pilots are excluded from charge of coasters *not* sailing under register under both R. S. 4401 and 4444, even treating them as separate enactments; and also that the pilotage of a British ship was not affected by either section. There was no occasion therefore for these opinions to refer to the original section of the Act of 1871 or to consider the history of the pilotage laws to that date, or the then existing commercial conditions.

However, when we examine the text of the first two of these cases we find that the distinction we make is clearly recognized by this Court.

In the case of *Sprague v. Thompson*, the Supreme Court lays down the criterion of exemption from State bar pilotage to be "was she piloted as provided by that 'title of the statute?'" It finds that she was so piloted because she was a coastwise sea-going steam vessel *and* (note the separate affirmation) "was not sailing under register". The language is as follows:

"According to the agreed case the *Saxon* was a coastwise seagoing steam vessel, was *not sailing*

*under register*, and at the time when the defendant in error tendered his services, and subsequently, when she passed up the river into Savannah, was under the control and direction of a pilot licensed by the United States inspectors of steamboats. She was therefore at the time *piloted as provided by that title of the statute, so that she was lawfully exempt from any pilot charges levied by any state or municipal government.*" (Italics ours.)

*Sprague v. Thompson*, 118 U. S. 90, at 96. .

If the Court had construed the act as our opponents would have it, there could be no need to find as a separate and distinct finding that she "was not sailing under register". All that would have been necessary would be to find that she was a coastwise vessel and had a federal pilot. But the Court intends clearly that the coastwise vessel may take a federal pilot and "be piloted as provided by the act" *only* if she be "not sailing under register". The general remarks of the Court concerning the exemption of coastwise vessels manifestly must refer to this class of coastwise vessels it has before defined.

In the next case, *Huns v. N. Y. & Porto Rico Steamship Company*, the Court makes the same careful distinction between the licensed vessels in the coastwise trade and those sailing under register. It holds that four facts are necessary to exempt a steam vessel from State pilotage: (a) that she was an American built steamship; (b) that she was enrolled and licensed for the coasting trade (and hence not sailing under register); (c) that she had a federal pilot and (d) that she was a coastwise sea-going vessel under R. S., Section 4401. The exact language of the Court is as follows:

“As the statement of facts connected with the question certified shows that the ‘Ponce’ was an American built steamship, sailing from New York, belonging to a New York corporation, *enrolled and licensed for the coasting trade*, navigated by a master duly licensed to act as pilot in the bay and harbor of New York under the laws of the United States, and was engaged in trade between the island of Porto Rico and the port of New York, *the only question remaining to be considered* is whether she was a coastwise seagoing steam vessel under *Revised Statute 4401* and actually employed in the coasting trade by way of Sandy Hook under paragraph 2119 of the New York Consolidation Act.” (Italics ours.)

*Haus v. New York &c. S. S. Co.*, 182 U. S. 392, at 395.

Two of the criteria are, has she a license, and hence is “not sailing under register”? And is she a coastwise vessel under Section 4401? Not Section 4444, but 4401, which gives a federal pilot for bar work only if the vessel is “not sailing under register”.

The subsequent general remarks concerning the exemption of coastwise vessels must mean the coastwise vessels included in Section 4401. No doubt the

“*general object* of these provisions seems to be to license federal pilots upon steam vessels engaged in the coastwise or interior commerce”.

but while it may be generally true, it is clearly not so of the excepted class of *steam vessels under register*.

This brings us to the case of *Olsen v. Smith*, 195 U. S. In that case the pilotage involved was that of a *British vessel*, so that the question of a right to im-

pose a fee on an American coastwise steamer "sailing under register" could not have been *directly* adjudicated.

Two questions were there brought before the Court which led to the discussion of R. S. 4444, though not as the last clause of Sec. 51 of the Act of 1871. The first was, Was the Texas pilotage law invalid *in toto* because it might be read to apply to all vessels coastwise and others? The Court answered that it was not invalid as to all its provisions because the federal law cancelled only those portions with which it was inconsistent. In the course of its discussion the Court says that Section 4444 removes coastwise vessels from the State laws, but it is in no way concerned with how completely it removes them, whether all of them or only those mentioned in Section 4401. The decision is no more than saying this: Admittedly Section 4444 does conflict with the State laws to a certain extent but that does not affect that portion of the State law with which it does not conflict.

The fact that the Court does not consider Section 4401 or Section 51 of the Act of 1871 shows that it was not making any attempt to show *how far* the federal law went in invading the realm of the State.

The second question in *Olsen v. Smith* was, Is the pilotage fee a violation of a treaty containing a clause against discrimination in favor of American vessels, because certain American vessels did not have to pay pilotage? Here again the question was not "are *all* coastwise vessels exempted", but "are *any*". If *any* the treaty, it

was claimed, is violated. The Court again says that R. S. 4444 exempts coastwise vessels, but that it is a right the United States has not given up by the treaty. Not a right because *all* coastwise vessels are withdrawn but a right covering all if Congress desires. The decision is no more than saying, Admitted that coastwise vessels, any of them or all, are free from State fees, the treaty is not violated by imposing such fees on a British ship.

Surely this is not an adjudication that, construing 4444 and 4401 together, in the light of Section 51 of the original act, Congress intended to take the registered coaster arriving from San Francisco, away from the Delaware pilot, in sailing from the Capes to Philadelphia.

The same distinction between the "enrolled and licensed" and the "registered" coastwise steamer is recognized by Judge Brown in *Bigley v. New York etc. Ry. Company*.

Judge Brown expressly points out that these statutes (4444 and 4401) create two great classes of steamers, coastwise sailing under a license (and hence "not sailing under register"), *and all other vessels*. As to all the others they remain "subject to State laws".

"The effect of the above acts of Congress, is to exempt all steam vessels sailing *under a license* and employed in the coastwise trade from the pilotage laws of the states; while *other vessels remain subject to the state laws*.

"As each of these vessels is a domestic vessel and was navigated *under a coasting license* of the United States no pilotage can be claimed under the

provisions of section 2119 of the New York statute above quoted, if the vessel was in fact 'employed in the coasting trade'; nor second, unless she was 'from a foreign port'." (Italics ours.)

*Bigley v. New York &c. Co.*, 105 Fed. 74 at 75 and 76.

We therefore submit that the plain intent of the statute, the logic of the situation viewed both from the standpoint of the history of the pilotage laws and of the necessities of navigation in 1871, and the decisions are all in accord. The State pilots have control of *all* registered vessels sailing coastwise and the question must be answered in the negative.

## IV.

**The Second Question Must be Answered in the Negative.**

The second question reads as follows:

Are there any provisions of title 52 of the Revised Statutes which may be construed as exempting coast-wise sea-going steam vessels sailing under register, whose officers have federal pilots' licenses, from any liability for pilotage fees created by Sections 2468, 2466 and 2432 of the Political Code of the State of California, upon the proper tender of services of resident bar pilots of the State pilotage establishment, when entering or leaving the port of San Francisco, State of California, *under the rule of construction laid down in the last sentence of Section 51 of the Act of February 28, 1871, entitled "An Act to Provide for the Better Security of Life on Board of Vessels Propelled in Whole or in Part by Steam", and as re-enacted in Section 4444 of the Revised Statutes?* (Italics ours.)

It is apparent that this question is subordinated to its predecessor and that a negative answer to the first requires the same to the second.

The question is important however in bringing out clearly the fact that Revised Statute 4444 is not to be considered as a separate enactment but merely as a part of the one paragraph making up Section 51 of the

Act of 1871. We again reproduce the two enactments in parallel columns, as follows:

“An Act to Provide for the Better SECURITY OF LIFE on Board of Vessels Propelled in Whole or in Part by Steam.

SECTION 51. And be it further enacted that \* \* \* every *coastwise sea-going steam-vessel* subject to the navigation laws of the United States, and the rules and regulations aforesaid NOT SAILING UNDER REGISTER, shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats \* \* Nor shall any pilot charges be levied by any such authority upon *any steamer piloted as herein provided*. \* \* \* Provided, however, that nothing in *this act shall be construed* to annul or affect any regulation established by the laws of any State requiring vessels entering or leaving port in any such State, other than coastwise steam-vessels, to take a pilot duly licensed, or authorized by the laws of such State, or of a State situate upon the waters of such State.” (Italics ours.)

R. S. 4401.

“\* \* \* and every *coastwise sea-going steam vessel* subject to the navigation laws of the United States and to the rules and regulations aforesaid, NOT SAILING UNDER REGISTER, shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats.”

R. S. 4444.

“\* \* \* nor shall any pilot charges be levied by any such authority upon *any steamer piloted as provided by this title*. \* \* \* Nothing in *this title shall be construed* to annul or affect any regulation established by the laws of any State requiring vessels entering or leaving a port in any such State, other than coastwise steam vessels, to take a pilot not duly licensed or authorized by the laws of such State, or of a State situate upon the waters of such State.” (Italics ours.)

The rule of construction referred to in the question is as set forth in the last clause in each column:—

“Nothing in this act (title) shall be construed to annul any regulation of \* \* \* any state requiring vessels entering or leaving any port, other than coastwise steam vessels” to take a State pilot.

As we have suggested this last clause of the section must be construed with the first and cannot be held to enlarge the exception of “coastwise steamers not sailing under register” to *all* coastwise steamers. The “particular phrase in the beginning of the paragraph “controls the general phrase at the end” which is but an Anglo Saxon expression of the rule of *ejusdem generis*.

The clause does not of itself withdraw any vessels from State pilotage. It merely points out that the previous enactment does not go *beyond* the class of coastwise vessels. *How much* of that class is affected one must look to the previous affirmative portions of the act to determine.

---

### **The Error in the Opinions Below.**

It was this treatment of Revised Statute 444 codifying this last clause of Section 51 as a separate enactment (we submit with deference) that caused the error of the judges below.

We did not appear in the case in the District Court but we have examined the briefs there and can find no reference to the Act of 1871 or even to R. S. Section

4401 which contains the first part of Section 51 of the original act. Certainly an opinion which considers neither and is based on briefs which mention neither, can have but little weight before this Court, even from the excellent judge of the Northern District of California. It should be said for the able proctor for libellants below, that he was laboring under a severe illness at the time of the preparing of the briefs.

Judge Ross' opinion also treats the enactments as separate and relies on Section 4444 as of itself creating an exception to State pilotage. The second certified question in which R. S. 4444 is described as laying down a mere rule of construction seems to indicate that his *confrere*, at least, have withdrawn from that position.

Judge Ross also relied largely on the assumption that R. S. Sections 4442 and 4438 create a system of federal pilots "proper" for coastwise steamers coming in from these *long registered voyages*.

In our petition for rehearing we printed these sections and the corresponding portions of the Act of 1852 in parallel columns and then suggested that this Court had held that the provisions of these sections did not constitute a "proper" pilotage system at all, but only a part of a system and a part of lesser importance at that. We have no doubt the conflict between his dictum on this point and Judge Field's contrary decision in *Joliffe v. Pacific Mail S. S. Co.* (see Section 1, *supra*) had a part in causing the certification of the questions before this Court. We must assume the blame for not having driven the point home till our petition for rehearing.

Judge Wolverton also treated Section 4444 as a separate enactment. His opinion says that if Congress had not intended in Section 4444 to take coastwise vessels "sailing under register" away from the control of the State pilots "it is more than probable that Congress would have reiterated the words", "not sailing under register".

It is apparent that the learned judge who wrote the second opinion is by his own logic driven to our interpretation of the act. *Congress did not have to reiterate the words of Section 4401 in Section 4444 because they were both part of one section of the Act of 1871.*

Judge Wolverton's concurring opinion seems to lay much stress on the assumption that no one had regarded the State law as applying to registered vessels in the coastwise trade up to 1905. It says:

"Sections 4401 and 4444 of the Revised Statutes were enacted into law in 1871, and it does not seem to have occurred to any one in the port of San Francisco to contest the right of the United States authorities to regulate the pilotage as it respects steam vessels plying in the coastwise trade until a recent statute was enacted by the State of California in 1905. In all the time preceding that, we must assume that the pilots upon such vessels were such as were licensed by United States authority and not by State authority. And where a statute has continued so long under one construction, it is persuasive of its rightful interpretation."

*The Queen*, 186 Fed. 725, at 735;

*Concurring opinion*, last paragraph.

This assumption had no basis on the record and is contrary to the fact. The "recent statute" is but an

amendment of a statute of over thirty years' standing. The amendment cuts the full pilotage fee in half but eliminates half pilotage (Political Code, Secs. 2466 and 2468). All the vessels of the Pacific Coast Steamship Company, including the *Queen* and *Umatilla*, *had paid part pilotage under the California law for many decades and up to the voyages here at bar*. All the registered vessels in the coastwise trade with Atlantic ports, either around South America or via Panama, have either taken a State pilot or paid the State's part pilotage. Whatever sanction the State laws can be said to have from long acquiescence, these laws possess.

It is submitted that the position taken in these opinions below is shown to be erroneous and that, as to the two of them in the Circuit Court of Appeals, the authors have withdrawn from it (temporarily at least) in consenting to the certification here. Section 444 presents but a rule of construction which when applied to Section 4401, leaves the State pilots in control of coastwise vessels "sailing under register".

## V.

**Considering Section 4444 Alone, and as Far as the Federal Pilot's Knowledge of Inland Waters is Concerned, a Vessel on a Voyage to a Foreign Port is Not a Coastwise Vessel, Even Though it Include a Coastwise Voyage.**

The third question reads as follows:

"3. Did Congress intend to classify with the 'coastwise vessels' referred to in the last proviso of section 51 of the Act of February 28, 1871, entitled 'An Act for the better security of life on vessels propelled in whole or in part by steam', and re-enacted in section 4444 of the Revised Statutes, registered steam vessels engaged in commerce with *both* foreign and domestic ports on the same voyage? (Italics ours.)

We have heretofore shown that R. S. 4444 should be construed with R. S. 4401, and in the light of Sec. 51 of the Act of 1871. We now consider it as an enactment by itself passed in 1871 "to provide for the better security of life" on steam vessels.

It is perfectly apparent that it is the *length* of the voyage which determines the knowledge of the officer on board a ship, concerning the changing conditions in the various American ports at which he may enter. It makes no difference what kind of cargo he has on board or whether he has none at all. When he has been on a voyage to a foreign port, he will be still less familiar with conditions in the home ports if he has added to the time of the foreign voyage, the time necessary to stop and take on cargo at other domestic ports.

It is our contention that if we construe Section 4444 with reference to "security of life" we must hold that life is less secure where the ship's officer attempts to pilot her in from a coastwise voyage plus a foreign one (even though not a pound of freight is loaded at the latter) than one that is purely coastwise or purely foreign.

When the act was passed the San Francisco-Vancouver trade did not exist, but even applying this rule of interpretation to that exceptional condition, we come to the same conclusion.

All steamers carrying directly between Vancouver and San Francisco alone must be registered and are hence subject to the state pilots. *A fortiori* should such registered vessels be subject to them when in addition to the trip to Vancouver they stop in Puget Sound ports *for a very large part of their cargo*, and thus are by so much the longer kept away from the San Francisco bar and entrance. Let us now take the real example, the case Congress must have had in mind:

Suppose a voyage from San Francisco to Philadelphia around South America, on which a steamship must be registered, as she must stop at foreign ports for coal. Suppose all her *cargo* is coastwise save a small parcel of a hundred tons taken on en route at Valparaiso. Then suppose the *same* voyage in which half the cargo is coastwise and half foreign; and the *same* voyage when a hundred tons is coastwise and three thousand tons foreign, having come from British Columbia.

Would it make the slightest difference as far as security of life while the ship's officer is piloting up Delaware Bay and on the Schuylkill, which one of the above cargoes he had on board? Manifestly not, and equally manifest that it is the character of the *voyage* and not the *cargo* that determines the meaning of the phrase "*coastwise vessels*" in R. S. 444.

It was this that Judge Gilbert had in mind when he says in his opinion:

"The field of legislation which Congress might have covered by pilotage regulations comprised three classes of vessels: First, licensed and enrolled vessels engaged in the coasting trade; second, registered vessels engaged partly in coasting trade and partly in foreign commerce; and third, registered vessels engaged wholly in foreign trade. Congress saw fit to regulate vessels of the first class only, and has never made any specific provision for vessels of the other two classes. It has left them to state legislation."

In our briefs in the Circuit Court of Appeals we criticised Judge De Haven's opinion because he based it chiefly on the fact that the preponderance of the cargo was coastwise and hence held the vessel was a coastwise vessel for purposes of pilotage. We tried to point out, just as we have here, that the kind of *cargo* had nothing to do with the question of pilotage in so far as the safety of the lives of the sailors and passengers on board is concerned. Judge Ross answered our contention in his opinion as follows:

"On behalf of the appellants it is suggested that the alleged error on the part of that court arose because it failed to remember that the existing

statutes of the United States upon the subject were enacted for the 'better protection of the lives of passengers'. The learned judge of the court below could hardly have been unmindful of the fact that the primary purpose of all pilotage laws is the safety of persons on board the vessels to be piloted."

With all deference we still urge that the *ratio decidendi* of the opinions of *both* these learned judges shows them "unmindful of the fact that the primary purpose " of all pilotage laws is the safety of persons on board " the vessels to be piloted".

Applying their rule of determining the nature of the vessel as coastwise or not, by the preponderance of cargo, let us stand alongside a steamer's captain coming into the Hell Gate at New York from a voyage from New Orleans via Havana. Surely Congress was not "unmindful" of the Hell Gate *as it was in 1871* or of the large trade then existing from the Gulf and Havana to New York.

Let us suppose that sixty per cent of the cargo in weight is from New Orleans, while sixty per cent in *value* on the manifest is from Havana, and eighty per cent of the passengers are from Havana, but the passengers from New Orleans (mostly first class) pay more money than the Havana passengers.

Now, let us suppose the captain knew all about the rule of the learned Judges and wanted to apply it, and all of us are with him on the bridge trying to help him out. The resident pilot is alongside and awaits our signal. "Can I take this vessel in past Hell Gate"? says the captain. "Where's your purser"? says our op-

ponent. "Let us look at his balance sheet." "He's sick", says the captain; "got the fever at Havana. Here's the manifest, though". "Why this is cotton from New Orleans and tobacco from Havana, and cotton had jumped by the time we reached Havana so it was worth more than the tobacco. This vessel is now sailing coastwise. You take her in, captain." "But how am I to know that cotton is now what it was at Havana. Besides there are these passengers. Eighty per cent come from the foreign port." "Oh, but captain", says our opponent, "you must look at the passage moneys, and more money comes from the passengers from New Orleans. Your vessel is certainly coastwise." "Are you not rather *unmindful* of the security of human life"?, says the captain. "Oh, no", says our opponent, "we are not. It was Congress that was unmindful." "Thank you", says the captain. "I'll take her in, but I *do* hope there is no mistake in the figures. What would I have done if the purser had been taken ill earlier on the voyage"?

Now this, we submit, is neither an extreme nor an unfair application of the rule laid down by these two Judges. Could Congress have meant this, when it passed R. S. 4444? We submit not. Congress must have intended some simpler, more *practicable* test for the guidance of the captain of the vessel from San Francisco when at the Hell Gate or the Capes of the Delaware or the mouths of the Mississippi, than the balance sheet of freight and passage moneys or the relative tonnage of cargo or number of passengers.

What that test is is perfectly plain. Has she been to a *foreign* port, thus requiring her to take a *register*? Has her *voyage* been a *foreign* voyage—whether foreign alone or both coastwise and to a foreign port? If so, the vessel is not “coastwise” within the meaning of Section 4444 exempting coastwise vessels from the control of these resident state pilots.

It will be noticed that if we interpret R. S. 4444 in this common sense way we do not conflict with the alleged adverse dicta in *Olson v. Smith*, even if we consider them out of their context. There is nothing in any of the opinions, other than those of Judges Ross and De Haven, which even suggests that a vessel is coastwise for purposes of pilotage if her balance sheet is coastwise and vice versa.

In our next section we will suggest how these two Judges fell into error. We feel confident that we have shown to a certainty that there is no reason why voyages which are both to foreign and domestic ports are to be treated as coastwise, and that the only vessels exempted by Congress from the control of the resident pilots are those on *voyages* purely coastwise and nothing else. The third certified question must be answered in the negative.

## VI.

**The Fourth Question Certifying the Whole Case  
Must be Answered in the Light of the First Three  
and in the Negative.**

The voyages in question in this suit were from San Francisco direct to Vancouver, then to Puget Sound ports, then to Vancouver, then direct to San Francisco. The bulk of the passengers and the freight were carried between the Puget Sound ports and San Francisco. The stop at Vancouver was for but an hour and may be deemed "en route".

As we have pointed out, this trade was not in existence in 1871, when Section 51 of the pilotage act was passed, or in 1873, when it was codified in R. S. 4401 and 4444. But the trade between Atlantic and Pacific ports around South America then was. In every respect, save as to length, it presents the same features. It began at a port of the United States and ended there. The great bulk of the cargoes were of domestic goods, the stops at Valparaiso and Sand Point were purely incidental, for a short time, and en route. A register was necessary and a simple feature easily distinguishing such vessels from others going coastwise, and "not sailing under register".

So, also, of the trade from the Gulf to north Atlantic ports. The bulk of the cargoes were cotton. The stops at Havana were incidental, for a comparative shorter time and smaller amount of merchandise. Also they were "en route".

Now, it is entirely conceivable that Congress, if legislating today and solely for the Vancouver-Sound trade, would not except coastwise vessels "sailing under register" from the control of the resident bar pilots at San Francisco. But it is not conceivable that an act in 1871 covering all these dangerous ports of both the Atlantic and the Pacific, intended to give to a captain the right to pilot his vessel in, when he had been absent for weeks and often months.

This is where Judges De Haven and Ross committed what we believe to be their error. They regarded the act as passed for the Vancouver-Sound trade alone and failed to appreciate how far-reaching their decision was. They saw only the California law as applied to this trade, and failed to realize that they were deciding for the ports of Louisiana, Pennsylvania, New York and Massachusetts as well.

We submit that the Act of 1871 must be interpreted with a view to the "better security of life" at all these ports and with a view to the *great* preponderance of voyages between American ports in vessels sailing under register, and not to an exceptional and smaller commerce which has since arisen.

If, however, Congress is to be credited with such prescience, it must have had in view the coastwise trade between Atlantic and Pacific ports destined to be carried through the Panama Canal. Even in fast freighters the ship's officers will be absent on round voyages to California and the Pacific coast from New York or Philadelphia or Boston over 40 days from these waters. In

most cases they will be away twice as long. They may at any time be compelled to call at Central American or West Indian ports for coal or supplies. Many will trade *en route* at these foreign ports. *All will be sailing under register.* Did Congress which has itself supplied no local pilotage intend to except these vessels from the control of the state pilot resident at these ports? The answer cannot be other than, No.

We therefore submit that the fourth question certifying the whole case, if it be answered at all, must be answered in the negative.

WILLIAM DENMAN,

*Proctor for Appellants.*

*Due service and receipt of a copy of the within is hereby admitted*

this Seventh day of February, 1912.

(Signed) } Geo. W. Towle

*Proctor for Appellees.*

IN THE  
SUPREME COURT OF THE UNITED STATES.  
OCTOBER TERM, 1911.

---

**No. 641.**

M. ANDERSON, APPELLANT,

*vs.*

THE PACIFIC COAST STEAMSHIP COMPANY (A CORPORATION), CLAIMANT OF THE STEAMSHIP "QUEEN," HER ENGINES, BOILERS, MACHINERY, TACKLE, APPAREL AND FURNITURE, APPELLEE.

---

**No. 642.**

N. JORDAN, APPELLANT,

*vs.*

THE PACIFIC COAST COMPANY (A CORPORATION), CLAIMANT OF THE STEAMSHIP "UMATILLA," HER ENGINES, BOILERS, MACHINERY, TACKLE, APPAREL AND FURNITURE, APPELLEE.

---

**REPLY BRIEF FOR APPELLANTS—SAN FRANCISCO BAR PILOTS—COVERING BOTH APPEALS.**

**The Formal Construction of Section 51 of the Act of  
March 28, 1871.**

The pertinent portion of section 51 of the act of 1871, as it appears in the certificate, reads as follows:

“An Act to Provide for the Better Security of Life on Board of Vessels Propelled in Whole or in Part by Steam.

“SECTION 51. *And be it further enacted,* That \* \* \* every coastwise sea-going steam vessel subject to the navigation laws of the United States, and to the rules and regulations aforesaid, *not sailing under register, shall,* when under way, except on the high seas, be under the *control and direction* of pilots licensed by the inspectors of steamboats. \* \* \* Nor shall *any pilot charges* be levied by any such (State) authority upon any steamer piloted as herein provided: \* \* \* *Provided, however,* That nothing in this act shall be construed to annul or affect any regulation established by the laws of any State requiring vessels entering or leaving a port in any such State, other than coastwise steam vessels, to take a pilot duly licensed, or authorized by the laws of such State, or of a State situate upon the waters of such State.”

(The above in a single paragraph.)

Our construction of this act is that the first clause limits the jurisdiction of the Federal pilots

to those coastwise vessels not sailing under register; the second clause prohibits the levying of State charges on any such coastwise vessel if the vessel is piloted by a Federal pilot as provided therein (the State might attempt to levy a charge against the licensed coaster for maintaining the pilotage service even though she did have a Federal pilot on board); and that the third, the proviso clause at the end relating to coastwise vessels, under the familiar rule of statutory construction, is not to be deemed to expand the scope of the enacting clause at the first of the act providing for coastwise vessels not sailing under register.

Our opponent's first criticism of this construction is that it makes the clause prohibiting the levying of tolls on vessels piloted under the provisions of the act (*i. e.*, coasters not registered) entirely superfluous. We are unable to follow his reasoning. Congress may very well have feared that the States would levy a toll on the licensed coaster even though they could not always put their pilots on board. They might well say "We have our service at hand for the licensed coasters. If the Federal pilot on board has lost track of bar and entrance and channel conditions, our pilots are there at his command. We are entitled to pay for maintaining the service for the occasion when they *do* want it, even though we cannot compel them to accept it, when they do not."

The situation is not unlike that of a steamer which mere "stands by" ready to render salvage

assistance to another which is in a dangerous position. The vessel standing by is entitled to a salvage lien on the vessel finally saved, even though she does not actually put a line on board of the other, and could not *compel* the other to accept her assistance.

Kennedy on Salvage, ch. 5, p. 125 (Ed. 1891).

Now, it entirely explains the clause prohibiting the levy of charges on vessels piloted as "provided herein" that Congress wanted to make certain that the State would not attempt to collect such pilotage fees from licensed coasters. To say coasters, not under register, shall be taken by Federal pilots, is entirely different from saying "nor shall such vessels pay any fees if Federal pilots are on board." Thus interpreted the provisions are correlative and supplementary. The second is not redundant.

Our opponent's next criticism is that the proviso at the end of the act of 1871 is meaningless, unless we treat it as a *grant of power* to the State to levy pilotage charges on all but coastwise steamers.

But the State does not receive its power to enact pilotage laws from a grant by Congress. This very question was considered by this court in *Gibbons vs. Ogden*, when court said:

"Although Congress cannot enable a State to legislate, Congress may adopt the provisions of a State on any subject. When the Government of the Union was brought

into existence it found a system for the regulation of its pilots in full force in every State. The act which has been mentioned (act of Aug. 7, 1789) *adopts* this system and gives it the same validity as if its provisions had been specially made by Congress."

Gibbons *vs.* Ogden, 9 Wheat., 207.

Congress clearly recognizes in the proviso of section 51 this distinction of Gibbons *vs.* Ogden, for it provides "that nothing in this act shall be *construed* to *annul* or *affect* any regulation," etc. The proviso merely states a rule of construction of other provisions. There is nothing in it purporting to delegate power. Nor is there anything in the proviso which, *of itself*, limits any power previously conferred. The proviso that nothing shall be construed to affect State regulations save as to *furnishing pilots* for coastwise vessels, leaves us free to *construe* the *other* Federal pilotage laws as to coastwise vessels. When we turn to construe those Federal laws we find that none can be construed as giving any coastwise vessels to Federal pilots, save those "not sailing under register."

The general terms of the proviso, in the nature of a summary, are subject to the rule of "*ejusdem generis*," the specific mention of coasters not registered, controlling over the general phrase "coastwise vessels."

As we have before suggested the rule of *ejusdem generis* is but another form of the axiom "particular phrases control general."

We submit that the construction of the act we urge does not occasion any redundancy, but on the contrary is one with itself. It makes its provisions entirely rational, and, we believe, far more consistent with the purpose expressed in its title than that of our opponent.

## II.

**Congress did not intend in the act of 1871 to establish Federal bar pilotage establishments. It was satisfied that its pilots, always on board, could bring in short-voyaged licensed coasters, but not the longer-voyaged registered vessels.**

The appellees seek to show that Congress intended to make three classifications, namely, registered vessels whose trade is almost entirely foreign, to be given to the State resident bar pilots; registered vessels mostly in the coastwise trade (making incidental foreign stops as at Valparaiso on a round voyage from New York to San Francisco), who *may* use their Federal pilots to the exclusion of the State pilots; and licensed coasters who *must* use Federal pilots.

They say that Congress must have as much confidence in its pilots for the short licensed coastwise voyage as it has for the relatively longer registered voyage of coastwise vessels.

Now, the significant thing here is that our opponents concede that Congress was moved by the underlying maritime fact that for purposes of

general classification the registered coaster *is* engaged in the longer voyages.

We are unable, however, to agree with the deductions which our opponents draw from this fact. They say that Congress made it optional with the registered coaster whether she should take a Federal or other pilot, because *in foreign waters* Congress might not control the pilotage of the vessel. But this presumes that the act contemplates control of pilotage outside the United States, whereas the provisions of the section (51 of act 1871) are in its first lines limited to vessels navigating "within the jurisdiction" of the United States. Congress in legislating for navigation within this jurisdiction *solely*, could not have been moved by considerations as to what might occur in foreign waters.

Their next argument is equally untenable. It is that the Federal pilot licensed for the Atlantic coast might not have a license for the Pacific coast, and, therefore, there should be an option given to the vessel as to whether she shall take a Federal or State pilot. It is apparent that on such a voyage there is no option given on the Pacific coast, so that the power of choice is confined to the Atlantic coast; *that is, when the vessel returns from her long voyage after the Federal pilot has been absent weeks, and quite likely months, from the Atlantic inland waters, over which the vessel is to navigate.*

The analysis of the contention brings this clear

*reductio ad absurdum* and need be pursued no further. Here we find the answer to our opponent's question as to why, if Congress was satisfied with its Federal pilots for licensed coasters, it was not satisfied with them for coastwise vessels sailing under register? *It was because Congress did not contemplate that the Federal pilots should be residential bar pilots, but intended that they should stay by the ship all through her voyage.* This is apparent from the following section of the Revised Statutes, compelling the Federal pilot to *stand watch* with the other officers of the ship:

“ R. S. 4131. All the officers of vessels of the United States who shall have *charge of a watch, including pilots*, shall in all cases be citizens of the United States.”

And from the following, in the act of 1871, requiring the pilot to have his certificate framed and hung up on the vessels on which he is sailing:

“SEC. 18. \* \* \* And every such \* \* \* pilot who shall receive a license as aforesaid, shall, when employed upon any such vessel, place his certificate of license (which shall be framed under glass) in some conspicuous place in such vessel, where it can be seen by passengers and others *at all times.*”

It is apparent that Congress did not intend that the supervising inspectors should establish any system of residential bar pilots, but contemplated

that the Federal pilot should be one of the ship's officers; should stay by the ship, and on long voyages, would necessarily be long absent from the waters of the home ports. It is absurd to suppose that a *residential* Federal pilot should climb up the rope ladder off his pilot boat and on to the steamer signaling to him, often in a raging sea, with his certificate, *framed under glass*, in his hand, ready to be hung where the passengers could at *all times* see it.

It is equally absurd to suppose that if the Federal pilot was to be a residential pilot, only taken on the steamer as she entered port, that he should be specially required to *stand watch* with the other officers. As a matter of fact he is supposedly on active duty on the bridge at all times till his vessel is moored or on the high seas, at which times he leaves her.

Even if the acts of 1871 and the later amendments did not, on their face, clearly indicate that Congress had no intention of creating a Federal residential pilotage, the fact that no new provisions for the examination and licensing of pilots have been enacted since the act of 1852, would compel this court to hold that Congress did not intend to create such a system. For it has so held as to that act in the case of *Joliffe vs. P. M. S. S. Co.*, which we have more fully considered at page 9 of our opening brief.

Our answer to our opponent's question is, Yes, Congress was not satisfied that its Federal pilots,

officers of registered coastwise vessels on these longer voyages, should bring their vessels into the ports of Philadelphia, or New York, or Mobile, or New Orleans, while it was satisfied to permit them to do so on the shorter-licensed voyages which kept them from these waters for a much shorter period.

### III.

**The act of 1867 expressly recognizing all State pilotage regulations, fortifies our contention that the act of 1871 merely excepts from them those coastwise vessels not sailing under register.**

The act of 1867 amends the act of 1866, leaving the law as follows:

“And *every* seagoing steam vessel now subject or hereby made subject to the navigation laws of the United States, and to the rules and regulations aforesaid, shall, when under way, *except upon the high seas*, be under the control and direction of pilots licensed by the inspectors of steam vessels; vessels of other countries and public vessels of the United States only excepted: *Provided, however*, That nothing in this act, or in the act of which it is amendatory, shall be construed to annul or affect any regulation established by the existing law of any State requiring vessels entering or leaving a port in such State to take a pilot duly licensed or authorized by the laws of such State, or of a State situate upon the waters of the same port.”

14 U. S. Statutes at Large, 412.

The act of 1871 by specific mention took away from the Federal pilots the control on inland waters of "*every*" sea-going steam vessel, and limited their control to such vessels "*not sailing under register.*"

Could anything show more significantly the intent that their control should not extend beyond the class thus cut out from the whole body of shipping? We confess that we are unable to follow our opponent's attempted reasoning to a contrary conclusion.

So also are we unable to follow counsel's contention that the proviso of the act of 1867 is a *limited grant of power* to the States, validating their existing systems. The term "*existing*" must, we believe, have reference to the system existing at the time of "*entering or leaving the port in such State,*" not at the time of the passage of the proviso. If not, we would have the absurd situation of the State losing its control of certain vessels if it should amend its laws and *reduce* the pilotage charges.

However, whether we interpret the word "*existing*" one way or another, Congress was recognizing full State control of pilotage when in 1871 it passed the law giving the control to Federal pilots only to coasters "*not sailing under register.*" The inference that it intended that the State should have the balance of the coastwise vessels seems too obvious to require argument. When we examine the length of the voyages of these remaining regis-

tered coasters with reference to pilotage, and the security of human life, the conclusion is irresistible that Congress meant that the residential State pilot should take them in.

#### IV.

**The executive construction of the act of 1871 has been, that it was not intended to create a system of Federal pilots residential at these more dangerous ports and cruising upon their waters.**

It is now over forty years since the act of 1871 was passed. There is not a *Federal pilot boat* in the United States. There is no Federal organization for furnishing a pilot living at any of these ports of more difficult access to entering steamers.

This is most significant. Surely with all the pressure the great shipping companies would bring to bear—we know, from the Chief Justice himself, that the struggle between the State pilots and the companies has been long and bitter—the Treasury Department, or its successor in these matters, the Department of Commerce and Labor, long ago would have established residential bar pilotage systems if it could have been done under the law.

That such executive construction shall receive consideration by this court is now long established.

“The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful con-

sideration, and ought not to be overruled without cogent reasons. *Edwards vs. Darby*, 12 Wheat., 210; *U. S. vs. Bk.*, 6 Pet., 29; *U. S. vs. MacDaniel*, 7 Pet., 1. *The officers concerned are usually able men, and masters of the subject. Not infrequently they are the draftsmen of the laws they are afterwards called upon to interpret."*

*U. S. vs. Moore*, 95 U. S., 760, 763.

In another case, in considering a ruling of the Treasury Department, the court says:

"But if there simply be doubt as to the soundness of that construction,—and that is the utmost that can be asserted by the Government,—the action during many years of the Department charged with the execution of the statute should be respected and not overruled except for cogent reasons. *Edwards vs. Darby*, 12 Wheat., 206, 210; *United States vs. Philbrick*, 120 U. S., 52, 59; *United States vs. Johnson*, 124 U. S., 236, 253; *United States vs. Alabama G. S. R. Co.*, 142 U. S., 615, 621."

*U. S. vs. Finnell*, 185 U. S., 236, 244.

The bill for the act of 1871 was drafted by the Treasury Department.

Congressional Globe, Feb. 16, 1871, part 2, page 1321.

We endeavored in our argument to point out the essential difference between residential pilotage and the pilot who is but one of the ship's officers.

Joliffe *vs.* The Pacific Mail Steamship Company explains the distinction very clearly. It needs but a moment's consideration to determine that, at *some* of the ports of the United States, such residential pilotage systems are absolutely necessary for the pilotage of vessels which have been long from their waters.

These harbors have large watersheds behind them—Delaware Bay with three rivers, Chesapeake Bay with two, New York harbor with the Hudson, the lower Mississippi with its several mouths, San Francisco Bay with the Sacramento and the San Joaquin rivers, the Columbia River entrance with its dangerous and varying bar. In all these are three incessant variables; first, the change in *channel* due to rearrangement of the deposit of silt on their bars and shallows; second, the change in *velocity* of current due to combination of tide and the variable quantity of river water, varying both with rainfall and with freeze and thaw; and third, the change in *cross-currents* and eddies due to variable combination of river water and tide and shifting of bars.

As these changes are from time to time noted by the State pilots, cruising in their pilot boats on the bars, and by other observers, they are posted at the various United States hydrographic offices. A glance at the bulletin board of any of these offices would quickly dispel any illusion that a vessel of any considerable size can be safely taken into some of our harbors by a man whose information as to conditions there is several weeks old.

And while this is true today, it was more certainly so in 1871, when the very extensive work since done on our rivers and harbors had been scarcely commenced.

The loss of the "Rio de Janeiro" is but a dramatic and conspicuous example of the not infrequent wrecking of vessels from change of currents due to changes of volume of fresh water from the watershed draining into the harbor and out of its entrance. In that case the State bar pilot knew his danger, protested against bringing in the vessel, but was overborne by the captain in command who was just returning with his vessel from the Orient.

We submit that the absence of any action by the Treasury Department towards creating a residential bar-pilotage service, with its cruising pilot boats, its fixed stations, and its code of signals as to changes in conditions, is most significant. Even if the rule of law that this court must regard this executive construction of the act were not clearly established, we would feel that, as a matter of novel impression, the court would adopt it in this case.

## V.

**The alleged inconsistency in our answer to the third certified question is due to a mere argumentative assumption.**

Our opponents complain that in our construction of section 4444 as a separate statute instead of as a proviso to section 51 of the act of 1871, we are inconsistent with the rest of our brief. They failed to read the significant paragraph at the beginning of section:

“We have heretofore shown that R. S. 4444 *should* be construed with R. S. 4401, and in the light of sec. 51 of the act of 1871. We now *consider* it as an enactment *by itself* passed in 1871 ‘to provide for the better security of life’ on steam vessels.”

Appellants’ Opening Brief, p. 41.

Congress in the act of 1871 undoubtedly intended a distinction between the long-voyaged registered vessels in the coastwise trade and the licensed coasters. But both Judges Ross and De Haven missed the point and treated section 4444, which merely codifies the *proviso* of section 51 of the act of 1871, as if it were a separate enactment.

Our argument on the third certified question, appearing from pages 41 to 46 of our brief, was addressed to the erroneous view of these opinions and aims to show that even construing it from their standpoint, a vessel sailing to a foreign

port is not a coastwise vessel, *for purposes of pilotage*.

We, however, now address that portion of our brief to the suggestion of our opponent that the third certified question cannot be answered because dependent on considerations not shown in the question.

What these other considerations are, appeared from his argument. They are, 1, the *relative* length of voyage *along the shores of the United States* as compared to other waters covered by the voyage; and, 2, the *relative* amount of *cargo*, as between domestic and foreign goods. That is to say, the captain, when he arrives at the home port from a round voyage, must add up the number of miles he has traveled in various waters and carefully examine his manifest to balance up the foreign goods against the domestic, and then determine whether his vessel is sailing coastwise or foreign. If the one, he may take her in himself; if the other, he must take a State pilot.

The absurdity of such a criterion we have shown by our illustration at page 44 of our brief. We now suggest another dilemma for the captain. Suppose the greater part of his voyage were along coasts of the United States, as from Seattle to San Francisco via Vancouver, and ninety-five per cent of the cargo was foreign, *i. e.*, from British Columbia? Did Congress intend to establish a rule that would subject the captain to such puzzling uncertainties?

We submit that Congress must have intended some simple and easy criterion, and that criterion was, "Have I a register?"

Our opponents suggest that some registered coasters are engaged exclusively in trade between American ports. In this he is entirely mistaken. *The register is never taken out save for the purposes of entering foreign ports.* Its entire significance, as far as pilotage is concerned, is—foreign port—hence longer voyage—hence less familiarity with bar conditions at home port.

It is true that with the acquisition of our insular possessions many foreign voyages are now shorter than those to our own ports, *but this was not the condition in 1871, when the act was passed.* It is in the light of our commerce and its routes at *that time* that the act must be interpreted. If the law no longer fits our changed conditions, the law should be changed by Congress and not by retrospective judicial interpretation.

So also it is true that the improvement in the steam engine since 1871 has not only increased the speed, but greatly decreased the coal consumption of our steamers, and as greatly increased their steaming radius. Vessels from the Gulf to North Atlantic ports may no longer find it economically advantageous to stop and coal and incidentally trade and take passengers at West Indian ports. But it is in the light of the condition of commerce as it *then was*, and of the steamboat of *that day*, whether carrying some of its coastwise goods to

New Orleans or to Aspinwall for California, or around South America to California ports, that Congress was legislating.

And, as our opponent concedes, in the light of that commerce the register meant the longer and the license the shorter voyage.

It is therefore submitted that all four of the certified questions should be answered in the negative.

WILLIAM DENMAN,  
*Proctor for Appellants.*